87-1161

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

STATE OF ILLINOIS,

Petitioner,

vs.

MICHAEL KIRKPATRICK,

Respondent.

**PETITION FOR A WRIT CERTIORARI
TO THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT**

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QUESTIONS PRESENTED FOR REVIEW

Whether the Appellate Court erroneously affirmed the trial court's order to suppress the defendant's blood stained clothing as evidence, where the clothing was properly seized under the plain view doctrine, since the clothing worn by defendant was in plain view in the police station, the police had the right to be in the police station, and the defendant told the police that he was involved in the circumstances surrounding the murder of Dorice Trykek.

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FIRST JUDICIAL DISTRICT**

Petitioner, the State of Illinios, respectfully prays that a Writ of Certiorari issue to review the judgment and the opinion of the Appellate Court of Illinois,First Judicial District, which was entered on March 18, 1987.

Opinion Below

The unpublished opinion of the Appellate Court of Illinois, First Judicial District, is reproduced in Appendix A to this Petition.

JURISDICTION

The opinion, order, and judgment of the Appellate Court of Illinois, First Judicial District, were entered on March 18, 1987. The People of the State of Illinois then petitioned the Supreme Court of Illinois for leave to appeal. On October 7, 1987, the Supreme Court of Illinois denied the petition for leave to appeal. This Petition for a Writ of Certiorari was due on December 7, 1987 and the State of Illinois requested that the time for filing the Petition for a Writ of Certiorari be extended up to and including January 7, 1988. United States Supreme Court Rule 20(1). The decision of the Appellate Court of Illinois was explicitly based on federal constitutional law. Specifically, the Appellate Court of Illinois held that defendant's blood stained clothing was

illegally seized in violation of the Fourth Amendment. Accordingly, the jurisdiction of this Court is invoked under 28 U.S.C. sec. 1257(3).

STATEMENT OF THE CASE

The defendant, Michael Kirkpatrick, was indicted for the murder of Dorice Tryteck. After an evidentiary hearing before the Honorable James A. Zafiratos, evidence, consisting of defendant's blood-stained clothing, a blood test, as well as hair and saliva tests, was suppressed. (R. 138) Defendant's case never proceeded to trial. The Appellate Court of Illinois affirmed the trial court's suppression of the evidence on March 18, 1987. The People petitioned the Supreme Court of Illinois for leave to appeal and on October 7, 1987, such petition was denied.

On June 6, 1985, an evidentiary hearing on defendant's motion to Suppress Evidence was conducted. At such hearing, defendant testified on his own behalf and

then rested. The People called Detective Ken Zolecke, Police Officers Roger Montoro and Edward Dedek as witnesses. The defendant then called Auxillary PoliceOfficer Dale Novarro, Auxillary Police Chief John Izzo, Watch Commander Anthony Adolf, Auxillary Police Officer Antoine Ilich, and Auxillary Police Officer Raul Fernandez.

At the hearing on defendant's motion, defendant testified as follows. On December 21, 1983, defendant entered the Cicero Police Department and reported that he was the victim of a crime. (R. 5, 17) Defendant was taken by Cicero Police to the Berwyn Police Department, where defendant collapsed. (R. 5, 18) Defendant was rushed by ambulance to MacNeal Hospital. (R. 5, 18) Defendant was admitted to the hospital since he suffered from a cerebral concussion which defendant testified that he received earlier

that day at the home of a friend. (R. 6, 16) At the hospital, uniformed police were outside defendant's room, and defendant had no phone access or visitors. (R. 7) When defendant was taken from his hospital room for medical tests, defendant was ankle-cuffed to his gurney. (R. 7) The defendant testified that he had not been informed that he was a suspect in Dorice Trytek's murder and was not told that the police took his clothes. (R. 8)

The defendant further stated that police officers later contacted him at his home, 10 to 15 times by telephone, to ask if he would consent to blood, hair, and saliva tests. (R. 11) On January 13, 1984, at approximately 4:00 p.m., the defendant met with Detectives Montoro and Dedak and went to the MacNeal Hospital. (R. 10) The defendant stated that he was not informed

that he had a right to refuse to take these tests. (R. 12) The defendant also stated that he told the detectives that he was on the medication "Elavil" to treat his cerebral concussion and reduce the risk of heart attack and that this drug made him barely conscious. (R. 13)

At the hospital, the defendant signed what he knew was a hospital waiver form and signed the bottom of another form that was under the hospital waiver. (R. 14-15) The defendant stated he did not know, at the time, what the second form was. (R. 14) The defendant stated that blood, hair, and saliva tests were taken and that his hair was cut, not pulled, for the hair test. (R. 14, 20) Following defendant's testimony, the defense rested.

The People called Detective Ken Zolecke who testified as follows. On

December 21, 1983, he was investigating the murder of Dorice Trytek and was told to talk to defendant at MacNeal Hospital, as defendant had been present and injured at Dorice Trytek's residence earlier that day. (R. 22-23) The defendant told Detective Zolecke that while he was at Dorice's home, three people struck him over the head and defendant lost consciousness. (R. 25) Defendant told the Detective that the next thing defendant remembered was waking up at Hines Lumber Company in Cicero. Detective Zolecke then learned the defendant had suffered a concussion and terminated the conversation. (R. 26) The detective then took the defendant's clothes and stated "[t]hat's normal procedure collecting trace material" such as fibers, hair, and blood. (R. 26) At the time he spoke with defendant, Detective Zolecke considered

defendant a victim, and testified that it was the usual procedure to take any victim's clothing. (R. 27) Detective Zolecke testified that he did not have a search warrant at the time he took the defendant's clothes. (R. 30)

The People next called Officer Roger Montoro who testified that he called the defendant on December 27, 1983, at approximately 9:30 p.m. and asked the defendant if he could give any more information about Dorice's murder as well as hair and blood samples. (R. 40, 42) The defendant told Officer Montoro that he would help out in any way that he could to find Dorice's killer. (R. 42) Officer Montoro spoke with the defendant a few more times on the phone over the next two and one-half weeks, and on January 13, 1984, he met the defendant, who was waiting outside of his

home for Montoro and Dedek, to bring him to the hospital for the tests. (R. 43-44)

Officer Montoro testified that he read the police blood sample waiver form to the defendant, who was listening. (R. 44) He handed it to the defendant to read and the defendant signed it both at the top and bottom, and also printed his name on it. (R. 45, 47) Montoro stated that he told the defendant he could refuse the test and that the defendant appeared to be normal and was participating in conversation before and after signing the form. (R. 47, 51, 58, 60) A copy of this thrice signed consent form was introduced at the hearing. (R. 46)

After the blood test, the defendant was asked if he would take a hair test to which he replied "fine." (R. 48) Montoro stated this test requires hair to be pulled, not cut, and that either the defendant or

Officer Dedek did the task. (R. 48-50) The defendant also submitted to a saliva test. (R. 50)

The People then called Officer Edward Dedek who corroborated the testimony of Officer Montoro. Dedek also stated that he was assigned to other investigations and was only helping on the instant investigation because the police department was shorthanded at the time. (R. 69) Dedek corroborated Montoro's testimony that the defendant was informed of his right to refuse the tests, that the defendant told them he would consent, and that he appeared in good health and conversed with the officers when they picked him up in front of his home. (R. 69-70) Officer Dedek also stated that the defendant himself plucked hair from his head for the hair test. (R. 72) Although Officer Dedek filled out the police report, it did

not reflect that the defendant had been informed of his right to refuse the tests. (R. 76)

The proceeding on defendant's motion was continued to August 13, 1985. The defendant called Auxillary Officer Dale Navarro who had been assigned to watch Dorice Trytek's house on the day of her murder. (R. 91-92) The defendant then called Auxillary Police Chief John Izzo who testified that he had dispatched Officer Navarro to the murder site and Auxillary Officers Ilich and Fernandez to MacNeal Hospital. (R. 94-95) The defendant's next witness, Police Watch Commander Anthony Adolf, corroborated Izzo's testimony. Commander Adolf also testified that the defendant was to have no visitors, no phone, and was to be cuffed to prevent him from leaving the hospital. (R. 102, 105) Adolf stated that this had occurred in

previous cases and the defendant was the only link in Dorice's murder. (R. 104, 105)

The defendant then called Auxillary Officer Anthony Ilich who testified that he was assigned to watch the defendant at MacNeal Hospital on December 21, 1983. (R. 108, 110) The defendant called Auxillary Officer Raul Fernandez who testified to receiving the same assignment as Officer Ilich. (R. 118) Neither Ilich nor Fernandez saw cuffs on the defendant. (R. 113, 122)

Both the defendant and the People submitted memoranda of law on the motion to suppress the evidence of the defendant's clothing and test results. (R. 122-125, 189, 194) The trial court sustained the defendant's motion to suppress holding that the seizure of defendant's clothing and the taking of the blood, hair and saliva samples

was in violation of defendant's Fourth and Fourteenth Amendment rights. (R. 138)[1]

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[1]The propriety of the trial court's suppression of the blood, hair, and saliva samples taken from defendant and the Appellate Court's affirmance of such suppression is not challenged in this petition.

REASON FOR GRANTING THE WRIT

THE APPELLATE COURT ERRONEOUSLY AFFIRMED THE TRIAL COURT'S ORDER TO SUPPRESS THE DEFENDANT'S BLOOD STAINED CLOTHING AS EVIDENCE, WHERE THE CLOTHING WAS PROPERLY SEIZED UNDER THE PLAIN VIEW DOCTRINE, SINCE THE CLOTHING WORN BY DEFENDANT WAS IN PLAIN VIEW IN THE POLICE STATION, THE POLICE OBVIOUSLY HAD THE RIGHT TO BE IN THE POLICE STATION, AND THE DEFENDANT TOLD THE POLICE THAT HE WAS INVOLVED IN THE CIRCUMSTANCES SURROUNDING THE MURDER OF DORICE TRYTEK.

The Appellate Court of Illinois held that defendant's blood stained clothing was illegaly seized in violation of the Fourth Amendment since the defendant's clothing was seized without a warrant and

since the elements of plain view doctrine were not satisfied. The State of Illinois maintains, as argued above, that defendant's clothing was legally seized under the plain view doctrine.

The plain view doctrine is based on the principle that when a police officer has observed an object in plain view, the owner's remaining interests in that object are merely those of possesson and ownership. Texas v. Brown, 406 U.S. 730, 739, 103 S.Ct. 1535, 1541 (1983). The doctrine is based upon reasonableness in that, under certain circumstances, objects falling in plain view of a law enforcement officer who has the right to be in the position to have that view are subject to seizure and may be introduced in evidence. Harris v. United States, 390 U.S. 234, 236, 88 S.Ct. 992, 993 (1968). The Fourth Amendment's central requirement of

reasonableness, that persons, houses, papers and people's effects be secure against unreasonable searches and seizures, must be balanced against the promotion of legitimate governmental interests in determining whether a particular law enforcement practice is permissible. Delaware v. Prouse, 440 U.S. 648, 654, 99 S.Ct. 1391, 1396 (1979). This plain view rule merely applies the reasonableness standard of the fourth amendment to the law governing seizures of property. Texas v. Brown, 460 U.S. 730, 739, 103 S.Ct. 1535, 1542 (1983).

In Illinois, the elements of the plain view doctrine are expressed as follows: First, the object seized is in plain view; second, the officer views the object from a position where he has a right to be; and third, the facts and circumstances known to the officer at the time he acts give rise to

a reasonable belief that the items seize constitute evidence of criminal activity. People v. Testa, 125 Ill. App. 3d 1039, 1043, 466 N.E.2d 1126, 1130 (1st Dist. 1984); See also People v. Torres, 144 Ill. App. 3d 187, 190, 494 N.E.2d 752, 754 (4th Dist. 1986). The requirements of the plain view doctrine as announced by this Honorable Court are essentially identical. See, Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022 (1971). In the case at hand, it is clear that all three requirements of the plain view doctrine were met, and thus, defendant's blood stained clothing was properly seized.

The first requirement of the plain view doctrine, that the object was seen in plain view, was clearly satisfied in the case at hand. The defendant, without warning, walked into the Cicero Police station wearing the blood-stained clothing in question.

Defendant's blood-stained clothing was not hidden in a bag or container but, while on defendant's body, was exposed to the public at large. The defendant displayed no privacy interest in the clothing and there is no evidence that he ever tried to conceal such clothing. Thus, such clothing was viewed in plain view.

The second requirement of the plain view doctrine, that the officer viewed the object from a position where he has a right to be, is also satisfied in the case at hand. Initially, the police viewed the defendant's clothing at the Cicero Police Station. Such is clearly a place where the police had a right to be. Secondly, the police viewed the defendant's clothing at the Berwyn Police station. Again, such is clearly a place where the police had a right to be. Thirdly, the police viewed the defendant's clothing at

MacNeal Hospital. The transporting of the defendant to the hospital necessitated that the police go to the hospital to interview him. (R. 22) Furthermore, while at the hospital, defendant's clothes were taken as part of a normal procedure to collect "trace material," to establish whether the defendant was at the scene of the crime and to identify other types of evidence from the defendant or other persons who may have been at the crime scene. (R. 26-27) Clearly, the police observed defendant's blood stained clothing from a place where they had a right to be.

The Appellate Court of Illinois, First Judicial District, found that since the eventual detention of defendant as a murder suspect was illegal, the police had no right to be in defendant's hospital room when they seized his clothes, thus finding that the second requirement of the plain view doctrine

was not satisfied. However, such finding was erroneous. The police, in plain view, saw the blood-stained clothing worn by defendant when he, without warning, entered the Cicero Police station as well as when defendant was taken to the Berwyn Police station. Clearly these were places where the police had the right to be. Moreover, it would have been unreasonable for the police to seize defendant's blood-stained clothing at either of the police stations since defendant collapsed upon entering the Berwyn Police station and had to be rushed to the hospital, where it was learned that defendant suffered from a cerebral concussion. It was at the hospital that the police had the first reasonable opportunity to seize defendant's clothing that had been in plain view when the defendant first walked through the doors of the police station. Therefore, the Appellate

Court of Illinois erroneously found that the second requirement of the plain view doctrine was not satisfied.

Lastly, the third requirement of the plain view doctrine, that the facts and circumstances known to the police at the time he acts give rise to a reasonable belief that the items seized constitute evidence of criminal activity, was likewise satisfied. The defendant told the police that a crime had occurred. (R. 17) The defendant told Detective Zolecke that while defendant was at the residence of Dorice Trytek on December 21, 1983, he was attacked by three people, and was struck in the head and knocked out. (R. 25) The detective had been informed that Dorice Trytek had been murdered on December 21, 1983, and that Michael Kirkpatrick had been injured at the scene. (R. 23) Defendant also told the detective

that defendant awoke some time later at the Hines Lumber Company in Cicero. (R. 25) The detective testified that because the defendant had been injured at a murder scene, his clothing may have contained trace material of the crime and that it was normal police procedure to take the clothes for analysis. (R. 26-27) Therefore, the detective took defnedant's clothing while defendant was at the hospital. (R. 26)

Clearly, the third requirement of the plain view doctrine was satisfied. The police knew that a murder had occurred, that defendant was present at the murder scene, that defendant had been injured, and that defendant wore blood-stained clothing. Such facts and circumstances gave the police a reasonable belief that the defendant's clothing was and contained evidence of a crime at the time such clothing was seized.

In addition to misconstruing the facts of the instant case that clearly show compliance with the plain view doctrine, the Appellate Court erroneously distinguished the People's caselaw from the instant case. The Appellate Court stated that the People's reliance on People v. Torres, 144 Ill. App. 3d 187, 494 N.E.2d 752 (4th Dist. 1986), was incorrect because the evidence in that case was not clothing but rather cannabis, and because the cannabis was seized from a hospital emergency room not a private hospital room. Kirkpatrick, Appendix A at 6. This distinction is incorrect. Torres held that police may seize contraband or other evidence that is in plain view. Torres, 494 N.E.2d at 754. Therefore, the court in Torres did not limit its holding to evidence of cannabis but rather any evidence found in plain view.

The Appellate Court also distinguished Torres on the fact that the cannabis was taken from a hospital emergency room which is more public than a hospital room. Kirkpatrick Appendix A at 6. This distinction is inconsistent with the holding of Torres and the facts of the instant case. There is no indication in the record that the defendant's clothing was seized from his hospital room. Additionally, the Torres court held that although an emergency room is not open to the general public, a medical facility is where many police investigations originate and Illinois law sanctions this practice by requiring medical personnel to report any injuries possibly stemming from criminal activities. Torres, 494 N.E.2d at 755. Moreover, the court in Torres recognized the necessity of immediate seizure when destruction of the evidence is a

possiblity. Torres, 494 N.E.2d at 755. In the instant case, there was a real possibility that defendant's clothing could have been thrown out by the defendant or washed by him or hospital personnel. This would have destroyed all trace materials contained therein which would have brought the investigation of Dorice Trytek's murder to a halt. The police in the instant case acted with the proper balance of alacrity and prudence in waiting until the defendant was brought by ambulance to the hospital before seizing the clothes at the first reasonable opportunity. Therefore, the holding of Torres is applicable to the instant case and the police properly seized the defendant's clothing as evidence of criminal activity when the defendant was brought to the hospital.

In the case at hand, the three elements of the plain view doctrine were unequivocally satisifed. The police properly seized the defendant's blood-stained clothing at the hospital. The Appellate Court of Illinois erroneously applied the relevant law and found that the requirements, in particular the second requirement, of the plain view doctrine were not satisifed. The State of Illinois urges this court to grant certiorari to correct this erroneous finding.

CONCLUSION

For all the foregoing reasons, the State of Illinois respectfully requests that a writ of certiorari issue to review the judgment of Appellate Court of Illinois, First Judicial District.

Respectfully submitted,

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A P P E N D I X

APPENDIX A

Docket No. 85-3389 -March 19, 1987. THE PEOPLE OF THE STATE OF ILLINOIS, APPELLANT, v. MICHAEL KIRKPATRICK, APPELLEE.

McNamara, P.J.,

O R D E R

On March 13, 1984, the defendant Michael Kirkpatrick was indicted for the murder of Dorice Trytek. Defendant moved to suppress evidence which the State had obtained after ostensibly detaining and questioning him as a victim of a crime. This evidence included the defendant's clothes as well as blood, hair, and saliva samples. Following an evidentiary hearing on the motion, the court suppress all four of these items because they were seized pursuant to an

illegal detention and without consent in violation of the defendant's Fourth Amendment rights. The State now brings this appeal, contending that: (1) the trial court erred in finding that the defendant was detained without probable cause and that his clothing was illegally seized during that detention; (2) the trial court erred in finding that the defendant did not effectively consent to giving blood, hair, and saliva samples; and (3) the blood, hair and saliva samples were not the direct product of an illegal detention.

At the suppression hearing, defendant testified that on December 21, 1983, he went to the Cicero police station after he awoke to find himself in a car in the Hines Lumber Yard in Cicero. Defendant said that he had previously spent the night at the apartment of Dorice Trytek, the murder

victim, and that at her apartment he had been knocked unconscious by an unknown woman.

Kirkpatrick testified that he was then driven to the Berwyn police department where he collapsed and thereafter was taken by ambulance to MacNeal Hospital where he remained for three to four days during treatment for a concussion. During this time a uniformed police guard was always stationed outside his door, and defendant was shackled to the bed until the doctors ordered him freed. He was also shackled to a gurney each time he was taken from the hospital room for tests.

Defendant also testifeid that he was not allowed access to a telephone during this time, nor was he allowed to see his wife. He also stated that he did not consent to have his clothes taken from him, and that he was never informed that he was a suspect in a homicide case.

Defendant then said that after he was released from the hospital, a police officer called him 10 to 15 times at home, asking him to come back to the hospital and give a blood sample. At this time he was taking a drug called Elavil for his head injury and this medication made him drowsy. The defendant stated that on January 13, 1984, he was escorted back to MacNeal Hospital by two police officers where he voluntarily signed the consent form for the withdrawal of blood. He later signed a second form, ostensibly a Berwyn police form, at this time but no one ever told him of his right to refuse. Defendant also said that although the police did not inform him of this right to refuse, they took his hair and saliva samples.

Investigator Ken Zolecke of the Berwyn police then testified that while the

defendant was at the hospital, he had taken the defendant's clothes, and given them to the evidence technicians. Zolecke said that it was normal procedure to take a crime victim's clothes in order to look for trace material associated with the crime. Zolecke also testified that when the defendant was in the hospital, the police regarded him as a victim of a crime, and not as a murder suspect. On cross-examination, Zolecke said he could not recall whether other police officers had been stationed outside defendant's room, but he did not concede that at the time he took the defendant's clothes he had no search or arrest warrant. He also stated on cross-examination that the defendant never gave oral or written consent to take his clothes.

Investigator Roger Montoro of the Berwyn police testified that he had been the officer who called on one occasion to

defendant's house to request saliva, blood, and hair samples. He said that when he talked to defendant on the telephone, defendant had said that he would "help out in any way that he could." Montoro also testified that he and his partner, Officer Ed Dedek, took defendant to MacNeal Hospital for a blood test, where defendant then signed a waiver consent form for a blood specimen. Montoro said that the defendant had orally consented to taking of hair samples. On cross-examination, Montoro conceded there had been no written consent form for hair and saliva samples, but that he had told defendant that he did not have to submit to a blood test. He also claimed that he told defendant that he had a right to refuse the saliva and hair sample tests.

Detective Dedek of the Berwyn police then testified that he and Montoro

accompanied the defendant to MacNeal Hospital for taking of samples. He said that he had told defendant that he did not have to consent to the taking of blood, but that the defendant had agreed to do so and also agreed to give hair and saliva samples; the defendant had even removed hair from his head himself. Dedek denied that defendant had been considered a murder suspect when these samples were taken. He also denied that he ever called defendant at home.

The record discloses that defendant's attorney sought to subpoena other Berwyn police officers, as well as Berwyn police records. The court granted this request. Subsequently, auxillary police chief John Izzo testified that on December 21, 1983, he received a call from the deputy superintendent who said that he needed some officers to go to MacNeal Hospital. Watch

commander of the Berwyn police department, Anthony Adolf, testified that he had told Officer Ilich to go to MacNeal Hospital for the purpose of watching the defendant. Adolf also testified that the defendant had been shackled by his foot, and that defendant had not been allowed any telephone calls or visitors. After viewing a police report to refresh his memory, Adolf stated that he had referred to the defendant as a suspect.

Berwyn police officer Antoine Ilich testified that on December 21, 1983, he received an assignment to guard defendant, who was described as a murder suspect by Adolf. Ilich also stated that Adolf had told him that there were to be no telephone calls, and no one was to have access to the defendant's hospital room. Ilich also said that he was in uniform and wearing his sidearm during his assignment.

Raul Hernandez of the Berwyn police department testified that he had also received an assignment to guard a murder suspect named Michael Kirkpatrick at MacNeal Hospital, and to make sure that there were no telephone calls or visitors for defendant. Hernandez then looked at a report which he had previously signed in order to refresh his memory, and which stated that he had functioned as hospital security for a murder suspect. While Hernandez was at the hospital a nurse had said that a doctor had removed the handcuffs from defendant.

Based on the evidence, the court concluded that defendant had been in police custody at the hospital and that the taking of his clothes constituted an illegal seizure. The court also found that the blood, saliva, and hair specimens taken on January 13, 1984, were nonconsensual and constitutionally

impermissible. The State now appeals this ruling.

The State first contends that the trial court erred in finding that the defendant's clothes were illegally seized. We agree with the trial court that the taking of defendant's clothes without a warrant constituted a seizure within the meaning of the Fourteenth Amendment. Defendant had a legitimate privacy interest in his clothes because: (1) he had a subjective expectation of privacy in the clothes he wore to the hospital; and (2) absent a custom to the contrary, a person would not automatically expect his clothes to be subject to police confiscation in a private hospital room. (See Katz v. United States (1967), 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (Harlan J., concurring).) The State's reliance on People v. Sutherland (1980), 92 Ill. App. 3d 338,

415 N.E.2d 1267, is misplaced because in that case, the credible testimony indicated that the customary practice in a hospital was to inventory the clothing of crime victims. In the present case, the trial court apparently concluded that there was no such customary procedure. Credibility of testimony is for the trial court to determine, and it will not be disturbed upon review unless it is manifestly erroneous. People v. Ellis, (1978), 74 Ill. 2d 489, 384 N.E.2d 331.

The State's reliance on People v. Torres, (1986), 144 Ill. App. 3d 187, 494 N.E.2d 752, is also inappropriate because in that case clothes were not the items seized -- -cannabis was. Furthermore, in that case there was no legitimate expectation of privacy in a hospital emergency room, because such a room constitutes a "port of entry" to the more private rooms in the hospital.

The State maintains that even if such a taking constituted a seizure within the meaning of the Fourteenth Amendment, the clothes are admissible under the plain view exception to the warrant requirement. Under this exception a police officer may, without a warrant, seize contraband or other evidence which is in plain view. (Texas v. Brown (1983), 460 U.S. 730, 75 L.Ed.2d 502, 103 SA.Ct. 1535.) In Illinois, the seizure of evidence is proper under the plain view doctrine when the following conditions are satisfied: (1) the object seized is in plain view; (2) the officer views the object from a position where he has a right to be; and (3) the facts and circumstances known to the officer at the time he acts gives rise to reasonable belief that the items seized constitute evidence of criminal activity. People v. Testa (1984), 125 Ill. App. 3d 1039, 466 N.E.2d 1126.

The overwhelming evidence in the record indicates that the police used force to confine defendant to his hospital room, and there has never been a claim that the police had probable cause to effect this confinement. Defendant had also testified that he had not consented to the taking of his clothes. Since the detention of defendant as a murder suspect was illegal, the police had no right to be in the defendant's hospital room when they seized his clothes, so it is immaterial whether the police seized the clothes as evidence of a criminal instrumentality.

Accordingly, we hold that the trial court did not err in suppressing defendant's clothing because the police obtained it in a place where they had no right to be.

The State also contends that the trial court erred in finding that defendant

had not validly consented to the taking of blood, saliva, and hair samples when he returned to MacNeal Hospital. We note that in the context of the Fourth Amendment, a suspect has a privacy interest in his own person. (See Schmerber v. California (166), 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908.) As a result, the warrantless seizure of physical evidence from a person, absent exigent circumstances or the evanescence of evidence, will be suppressed unless the defendant consents to the taking. (Schmerber v. California, see also Cupp v. Murphy, (1973), 412 U.S. 291, 93 S.Ct. 2000, 36 L.Ed.2d 900.) The State must prove consent by clear and positive testimony and must also establish that there was no duress or coercion, actual or implied. (Schneckloth v. Bustamote (1973), 412 U.S. 218, 36 L.Ed.2d 854, 93 S.Ct. 2041.) Courts indulge every

reasonable presumption against waiver of fundamental constitutional rights. (Johnson v. Zerbst, (1938), 304 U.S. 458, 82 L.Ed.2d 1461, 58 S.Ct. 1019.) Voluntariness is a question of fact to be determined from all the circumstances, and although the State need not show that a consenting party was advised of his rights secured by the Fourth Amendment, the failure to do so is a factor which bears on the understanding nature of the consent. Schneckloth v. Bustamote.

In this instance, the trial court apparently believed the defendant's testimony because it found that he never effectively consented to the taking of blood samples for laboratory analysis. The trial court also found that the taking of saliva and hair samples should have been done with a court order. The record discloses that defendant claimed to be taking medication which made

him drowsy at the time he signed the consent form for the blood sample. Also, according to defendant's testimony, the police repeatedly called him at his home and then accompanied him to the hospital after an original four-day hospital stay in which he had been effectively isolated by armed guards and shackled for a time to his bed. It is also significant that according to defendant the police never told him of his right to refuse the giving of such samples.

All the above circumstances would allow a conclusion that defendant was at least impliedly coerced into cooperating with the police, and that his consent was not freely and voluntarily given. Although there is considerable conflicting testimony in the record, especially with respect to oral consent for saliva and hair samples, we do not see any reason to reverse the trial

court's credibility findings. (See People v. Devine (1981), 98 Ill. App. 3d 914, 424 N.E.2d 823, cert. denied, 458 U.S. 1109, 73 L.Ed.2d 1371, 102 S.ct. 3490.) Therefore, we conclude that the trial court did not err when it suppressed defendant's blood, hair and saliva samples. Because we affirm the suppression on this basis, we need not address the State's contention that the taking of the samples was sufficiently removed from the original four-day hospital detention to dissipate any taint of illegality.

Therefore, we affirm the order of the circuit court.

Order affirmed.

WHITE and FREEMAN, JJ., concur.

APPENDIX B

October 7, 1987

Hon. Richard M. Daley
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No. 65144 - People State of Illinois, petitioner, v. Michael Kirkpatrick, respondent. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 29, 1987.

No. 87-1161

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

STATE OF ILLINOIS,

Petitioner

vs.

MICHAEL KIRKPATRICK,

Respondent.

On Petition For A Writ of Certiorari
To The Appellate Court of Illinois,
First Judicial District.

BRIEF IN OPPOSITION TO CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Appellate Court correctly affirmed the trial court's suppression order, where the record is devoid of evidence that defendant's seized clothing was in plain view of either the officer making the seizure or any other officer, and where the reviewing court properly found that "overwhelming evidence" indicated the police had no right to be in defendant's hospital room, from which his clothing was seized.

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IN THE

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BRIEF FOR RESPONDENT IN OPPOSITION TO CERTIORARI

OPINION BELOW

The state reviewing court disposed of petitioner's appeal in an unpublished order pursuant to Illinois Supreme Court Rule 23. Ill. Rev. Stat., 1985, Ch. 110A, Sec. 23. Rule 23 states, in applicable part, that orders, as opposed to published opinions, are not precedential. The State court's Rule 23 Order is photographically reproduced in Appendix A to this brief for respondent.

JURISDICTION

The jurisdictional requisites are adequately stated in the petition. Respondent notes, however, that the Appellate Court decision relied on both State and Federal law. (Petition for Writ of Cert., Appendix, p.12) Although this fact does not deprive this Court of jurisdiction, it suggest an independent basis for affirmance. In addition, as set forth in the argument that follows, respondent does not believes petitioner has shown any reason for this Court to exercise its sound judicial discretion to grant the petition so that the state court order may be reviewed.

STATEMENT OF THE CASE

On December 21, 1983 defendant Michael Kirkpatrick walked into the Cicero, Illinois police station. According to Captain Manak, defendant reported having been at Dorice Trytek's Berwyn apartment early that morning. (R.178) He came out of the bathroom and saw Dorice speaking to two white men. As he turned off the bathroom light, he was hit over the head by a white woman. (R.179) Defendant told police he recalled nothing further until he awoke 10-12 hours later in his car, parked at Hines Lumber Company in Cicero. (R.179,183)

Defendant apparently drove immediately to the Cicero police station, where he arrived at 1:30 p.m. (R.178) Cicero police drove him to tne Berwyn Police Department (R.5), where he collapsed. (R.18) He was rushed by ambulance to MacNeal Hospital and admitted for head injuries. (R.6,16) During defendant's entire 3-4 day hospitalization, which followed, an armed uniformed police guard was stationed outside his door. (R.6,97,116) Defendant was snackled to the bed until doctors ordered him freed (R.121), and he was shackled to a gurney each time he was taken from his hospital room for tests. (R.8) The telephone was removed from his room on orders of Officer Garrity (R.118), and defendant was permitted no calls or visits whatsoever, not even from his wife. (R.7-8,102,118) Two of the guards testified they received instructions to guard a "murder suspect". (R.110-111,118)

At 3:45 p.m. on December 21, 1983, Berwyn police detective Ken Zolecke went to MacNeal Hospital to speak with defendant. (R.22) Although defendant was in "pretty bad shape" (R.33), he spoke to the detective in his hospital room and reported that he had been attacked by three people at Dorice's apartment and knocked out, and that he woke up at the Hines Lumber Company in Cicero. The officer testified he learned at the hospital that defendant had suffered a head injury. At that point, the office terminated his conversation

with defendant, and without defendant's consent took his clothes as evidence. (R.8,26,33) According to the detective's testimony, defendant was a crime victim, and it is normal police procedure to take a victim's clothing to test it for "trace material." (R.26,27)

After hearing, written memoranda of law and extensive argument, the trial judge suppressed the clothing. (R.138) The court rejected police testimony tnat the clothing had been taken because defendant was a crime victim and was, at the time, the only link to a homicide under investigation. (R.132,138) The court found, on the contrary, that defendant was considered a suspect when he entered the police station, found he was unlawfully detained without probable cause, and found the seizure non-consentual and violative of tne Fourtn and Fourteenth amendments. (R.138) State appeal followed.

REASONS FOR DENYING THE WRIT

THE STATE COURTS CORRECTLY APPLIED THE LAW TO THE FACTS OF THIS CASE, WHERE THE RECORD CONTAINS NO EVIDENCE THAT RESPONDENT'S SEIZED CLOTHING WAS EVER IN PLAIN VIEW, AND WHERE IT WAS SEIZED FROM RESPONDENT'S HOSPITAL ROOM, WHERE THE POLICE HAD NO RIGHT TO BE.

Petitioner's argument rests decisively on the plain view doctrine. There is no evidence, however, that defendant's seized clothing was ever in plain view of any police officer.

Defendant's socks, vest, sweater, shirt, boots, belt and jeans were seized from his hospital room. (R.9) Although the seizure occured during a Chicago winter (December 21, 1983) there is no evidence any outer garments were seized. In Illinois, seizure of evidence is proper under the plain view doctrine when the following conditions are satisfied:

1) the object seized is actually in plain view;

2) the officer views the object from a position where he has a right to be; and

3) facts and circumstances known to the officer at the time he acts give rise to a reasonable belief that the items seized constitute evidence of criminal activity.

People v. Testa (1984), 125 Ill. App. 3d 1039, 1043, 466 N.E. 2d 1126, 1130; People v. Montgomery (1980), 84 Ill. App. 3d 695, 698, 405 N.E. 2d 1275; People v. Holt (1974), 18 Ill. App. 3d 10, 12, 309 N.E. 2d 376. In affirming the trial court's suppression order, the appellate court found "overwhelming evidence" that defenant had been forcibly confined to his hospital room without probable cause. Thus, the police had no right to be in his hospital room when they seized his clothing. (Opinion, p.6-7)

Since the second requrement of the plain view doctrine was not met, the reviewing court did not have to decide whether the other two requirements had been met. In fact, they had not. The seized items must actually be in open view. In other words, they must be "inadvertently come upon," and "it must be immediately apparent to the police that they have evidence before them." Coolidge v. New Hampshire (1971), 403 U.S. 443, 466-468, 29 L.Ed. 2d 584; People v. Tate (1967), 38 Ill. 2d 184, 230 N.E. 2d 697.

There is no evidence in the record that defendant's clothing was in plain view when it was seized or that it was immediately apparent to the police that it constituted evidence of a crime. Defendant walked into the Cicero police station at 1:30 p.m., collapsed at the Berwyn police station, and was rushed by ambulance to MacNeal Hospital. None of the officers who observed defendant during this period seized defendant's clothing, and none testified at the suppression hearing. Detective Zolecke arrived at the hospital more than two hours after defendant had walked into the police station. (R.22) He was not asked at the suppression hearing whether defenant was wearing the seized items, and he was not asked whether the clothing was otherwise visible to him during his conversation with defendant. Since there was no evidence the clothing was ever observed prior to its seizure, there was no evidence it was immediately apparent to the police that they had evidence before them." Coolidge, supra, p.466.

Having failed to satisfy both federal and state requirements of the plain view doctrine at the time of the seizure, the State now argues that defendant's clothing must have been within plain view of non-testifying police officers more than two hours earlier, when defendant walked into the police station. (Pet. for Cert., p.18-19) Leaving aside the dubious legal merit of this argument, it is not factually supported by the record. No officer testified to having seen "blood-stained" clothing at any time. On the contrary, Det. Zoelke, who made the seizure, claimed defendant was a crime victim, and it was normal police procedure to take a victim's clothing for "collecting trace material." (R.26,27) The trial court rejected the detective's testimony and found, first, that defendant was treated as a suspect, not as victim as the detective claimed and, second, that there was no customary procedure to seize clothing, as the detective claimed. The State, having failed to present any evidence that defendant ever voluntarily displayed visibly blood stained clothing to the public, cannot now assume that unidentified police officers at some unidentified prior time probably saw the clothing, thereby justifying any subsequent seizure under the plain view doctrine. The fact that the clothing was seized not because it was visibly blood-stained, but to test for "trace material" further demonstrates the factual insufficiency of this argument.

Petitioner's argument rests on facts rejected by both the trial and appellate court and on a novel legal theory which, even if valid, would not find factual support in this record. This Court traditionally has not granted certiorari to State reviewing courts to review the factual correctness of state court decisions. Watts v. Indiana (1949), 338 U.S. 49, 50 n.1, 93 L.Ed. 1801. Resolution of factual matters should be left to the states and certiorari denied.

CONCLUSION

For the reasons stated herein, respondent Michael Kirkpatrick respectfully requests that this Honorable Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

Third Div. Filed 3-18-87

NOTICE

The text of this opinion may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposit of the same.

85-3389

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS Plaintiff-Appellant, vs. MICHAEL KIRKPATRICK, Defendant-Appellee.	)	Appeal from the Circuit Court of Cook County. Honorable James A. Zafiratos, Judge Presiding.

McNAMARA, P.J.,

O R D E R

On March 13, 1984, the defendant Michael Kirkpatrick was indicted for the murder of Dorice Trytek. Defendant moved to suppress evidence which the State had obtained after ostensibly detaining and questioning him as a victim of a crime. This evidence included the defendant's clothes as well as blood, hair, and saliva samples. Following an evidentiary hearing on the motion, the court suppressed all four of the items because they were seized pursuant to an illegal detention and without consent in violation of the defendant's Fourth Amendment rights The State now brings this appeal, contending that: (1) the trial court erred in finding that the defendant was detained without probable cause and that his clothing was illegally seized during that detention; (2) t trial court erred in finding that the defendant did not effectively consent to giving blood, hair, and saliva samples; and (3) the blood, hair, and saliva samples were not the direct product of an illegal

detention.

At the suppression hearing, defendant testified that on December 1983, he went to the Cicero police station after he awoke to find hims in a car in the Hines Lumber Yard in Cicero. Defendant said that he h previously spent the night at the apartment of Dorice Trytek, the murd victim, and that at her apartment he had been knocked unconscious by a unknown woman.

Kirkpatrick testified that he was then driven to the Berwyn polic department where he collapsed and thereafter was taken by ambulance to MacNeal Hospital where he remained for three to four days during treat ment for a concussion. During this time a uniformed police guard was always stationed outside his door, and defendant was shackled to the b until the doctors ordered him freed. He was also shackled to a gurney each time he was taken from his hospital room for tests.

Defendant also testified that he was not allowed access to a tele- phone during this time, nor was he allowed to see his wife. He also stated that he did not consent to have his clothes taken from him, and that he was never informed that he was a suspect in a homicide case.

Defendant then said that after he was released from the hospital, police officer called him 10 to 15 times at home, asking him to come b to the hospital and give a blood sample. At this time he was taking a drug called Elavil for his head injury and this medication made him drowsy. The defendant stated that on January 13, 1984, he was escorted back to MacNeal Hospital by two police officers where he voluntarily signed the consent form for the withdrawal of blood. He later signed a second form, ostensibly a Berwyn police form, at this time but no one ever told him of his right to refuse. Defendant also said that

although the police did not inform him of this right to refuse, they to his hair and saliva samples.

Investigator Ken Zolecke of the Berwyn police then testified that while the defendant was at the hospital, he had taken the defendant's clothes, and given them to the evidence technicians. Zolecke said that it was normal procedure to take a crime victim's clothes in order to lo for trace materials associated with the crime. Zolecke also testified that when the defendant was in the hospital, the police regarded him as victim of a crime, and not as a murder suspect. On cross-examination, Zolecke said he could not recall whether other police officers had been stationed outside defendant's room, but he did concede that at the time he took the defendant's clothes he had no search or arrest warrant. He also stated on cross-examination that the defendant never gave oral or written consent to take his clothes.

Investigator Roger Montoro of the Berwyn police testified that he had been the officer who called on one occasion to defendant's house to request saliva, blood, and hair samples. He said that when he talked to defendant on the telephone, defendant had said that he would "help out in any way that he could." Montoro also testified that he and his partner, Officer Ed Dedek, took defendant to MacNeal Hospital for a blood test, where defendant then signed a waiver consent form for a blood specimen. Montoro said that the defendant had orally consented to taking of hair samples. On cross-examination, Montoro conceded there had been no written consent form for hair and saliva samples, but that he had told defendant that he did not have to submit to a blood test. He also claimed that he told defendant that he had a right to refuse the saliva and hair sample tests.

Detective Dedek of the Berwyn police then testified that he and Montoro accompanied the defendant to MacNeal Hospital for taking of samples. He said that he had told defendant that he did not have to consent to the taking of blood, but that the defendant had agreed to do so and also agreed to give hair and saliva samples; the defendant had even removed hair from his head himself. Dedek denied that defendant h been considered a murder suspect when these samples were taken. He als denied that he ever called defendant at home.

The record discloses that defendant's attorney sought to subpoena other Berwyn police officers, as well as Berwyn police records. The court granted this request. Subsequently auxiliary police chief John Izzo testified that on December 21, 1983, he received a call from the deputy superintendent who said that he needed some officers to go to MacNeal Hospital. Watch commander of the Berwyn police department, Anthony Adolf, testified that he had told Officer Ilich to go to MacNea Hospital for the purpose of watching the defendant. Adolf also testifi that the defendant had been shackled by his foot, and that defendant ha not been allowed any telephone calls or visitors. After viewing a poli report to refresh his memory, Adolf stated that he had referred to the defendant as a suspect.

Berwyn police officer Antoine Ilich testified that on December 21, 1983, he received an assignment to guard defendant, who was described a a murder suspect by Adolf. Ilich also stated that Adolf had told him that there were to be no telephone calls, and no one was to have access to the defendant's hospital room. Ilich also said that he was in unifo and wearing his sidearm during his assignment.

Raul Hernandez of the Berwyn police department testified that he

also received an assignment to guard a murder suspect named Michael Kirkpatrick at MacNeal Hospital, and to make sure that there were no telephone calls or visitors for defendant. Hernandez then looked at a report which he had previously signed in order to refresh his memory, which stated that he had functioned as hospital security for a murder suspect. While Hernandez was at the hospital a nurse had said that a doctor had removed the handcuffs from defendant.

Based on the evidence, the court concluded that defendant had been in police custody at the hospital and that the taking of his clothes constituted an illegal seizure. The court also found that the blood, saliva, and hair specimens taken on January 13, 1984, were nonconsensua and constitutionally impermissible. The State now appeals this ruling.

The State first contends that the trial court erred in finding tha defendant's clothes were illegally seized. We agree with the trial cou that the taking of defendant's clothes without a warrant constituted a seizure within the meaning of the Fourteenth Amendment. Defendant had a legitimate privacy interest in his clothes because: (1) he had a subjective expectation of privacy in the clothes he wore to the hospital and (2) absent a custom to the contrary, a person would not automaticall expect his clothes to be subject to police confiscation in a private hospital room. (See Katz v. United States (1967), 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (Harlan, J., concurring).) The State's reliance on People v. Sutherland (1980), 92 Ill. App. 3d 338, 415 N.E.2d 1267, is misplaced because in that case, the credible testimony indicate that the customary practice in a hospital was to inventory the clothing of crime victims. In the present case, the trial court apparently concluded that there was no such customary procedure. Credibility of

testimony is for the trial court to determine, and it will not be disturbed upon review unless it is manifestly erroneous. People v. El (1978), 74 Ill. 2d 489, 384 N.E.2d 331.

The State's reliance on People v. Torres (1986), 144 Ill. App. 3d 187, 494 N.E.2d 752, is also inappropriate because in that case clothes were not the items seized -- cannabis was. Furthermore, in that case there was no legitimate expectation of privacy in a hospital emergency room, because such a room constitutes a "port of entry" to the more private rooms in the hospital.

The State maintains that even if such a taking constituted a seizu within the meaning of the Fourteenth Amendment, the clothes are admissi ble under the plain view exception to the warrant requirement. Under this exception a police officer may, without a warrant, seize contraban or other evidence which is in plain view. (Texas v. Brown (1983), 460 U.S. 730, 75 L. Ed. 2d 502, 103 S. Ct. 1535.) In Illinois, the seizure of evidence is proper under the plain view doctrine when the following conditions are satisfied: (1) the object seized is in plain view; (2) tl officer views the object from a position where he has a right to be; an (3) the facts and circumstances known to the officer at the time he act gives rise to reasonable belief that the items seized constitute eviden of criminal activity. People v. Testa (1984), 125 Ill. App. 3d 1039, 4 N.E.2d 1126.

The overwhelming evidence in the record indicates that the police used force to confine defendant to his hospital room, and there has nev been a claim that the police had probable cause to effect this confine- ment. Defendant had also testified that he had not consented to the taking of his clothes. Since the detention of defendant as a murder

suspect was illegal, the police had no right to be in the defendant's hospital room when they seized his clothes, so it is immaterial whethe the police seized the clothes as evidence of a criminal instrumentalit

Accordingly, we hold that the trial court did not err in suppress defendant's clothing because the police obtained it in a place where t had no right to be.

The State also contends that the trial court erred in finding tha defendant had not validly consented to the taking of blood, saliva, anc hair samples when he returned to MacNeal Hospital. We note that in the context of the Fourth Amendment, a suspect has a privacy interest in hi own person. (See Schmerber v. California, (1966), 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed.2d 908.) As a result, the warrantless seizure of physical evidence from a person, absent exigent circumstances or the evanescence of evidence, will be suppressed unless the defendant consen to the taking. (Schmerber v. California; see also Cupp v. Murphy (1973 412 U.S. 291, 93 S. Ct. 2000, 36 L. Ed. 2d 900.) The State must prove consent by clear and positive testimony and must also establish that there was no duress or coercion, actual or implied. (Schneckloth v. Bustamonte (1973), 412 U.S. 218, 36 L. Ed. 854, 93 S. Ct. 2041.) Courts indulge every reasonable presumption against waiver of fundamental constitutional rights. (Johnson v. Zerbst (1938), 304 U.S. 458, 82 L. Ed. 1461, 58 S. Ct. 1019.) Voluntariness is a question of fact to be determined from all the circumstances, and although the State need not show that a consenting party was advised of his rights secured by the Fourth Amendment, the failure to do so is a factor which bears on the understanding nature of the consent. Schneckloth v. Bustamonte.

In this instance, the trial court apparently believed the defendant's testimony because it found that he never effectively consented t the taking of blood samples for laboratory analysis. The trial court also found that the taking of saliva and hair samples should have been done with a court order. The record discloses that defendant claimed t be taking medication which made him drowsy at the time he signed the consent form for the blood sample. Also, according to defendant's testimony, the police repeatedly called him at his home and then accomp nied him to the hospital after an original four-day hospital stay,in which he had been effectively isolated by armed guards and shackled for time to his bed. It is also significant that according to defendant th police never told him of his right to refuse the giving of such samples

All the above circumstances would allow a conclusion that defendan was at least impliedly coerced into cooperating with the police, and th his consent was not freely and voluntarily given. Although there is considerable conflicting testimony in the record, especially with respe to oral consent for saliva and hair samples, we do not see any reason t reverse the trial court's credibility findings. (See People v. Devine (1981), 98 Ill. App. 3d 914, 424 N.E.2d 823, cert. denied 458 U.S. 1109 73 L. Ed. 2d 1371, 102 S. Ct. 3490.) Therefore, we conclude that the trial court did not err when it suppressed defendant's blood, hair, and saliva samples. Because we affirm the suppression on this basis, we ne not address the State's contention that the taking of the samples was sufficiently removed from the original four-day hospital detention to dissipate any taint of illegality.

Therefore, we affirm the order of the circuit court.

Order affirmed.

WHITE and FREEMAN, JJ., concur.